UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-80736-Civ-Marra/Matthewman

JANE DOE 1 AND JANE DOE 2,

Petitioners,

vs.

UNITED STATES,

Respondent.
_____/

DECLARATION OF A. MARIE VILLAFAÑA IN SUPPORT OF GOVERNMENT'S RESPONSE AND OPPOSITION TO PETITIONERS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

1. I, A. Marie Villafaña, do hereby declare that I am a member in good standing of the Bar of the State of Florida. I graduated from the University of California at Berkeley School of Law (Boalt Hall) in 1993. After serving as a judicial clerk to the Hon. David F. Levi in Sacramento, California, I was admitted to practice in California in 1995. I also am admitted to practice in all courts of the states of Minnesota and Florida, the Eighth, Eleventh, and Federal Circuit Courts of Appeals, and the U.S. District Courts for the Southern District of Florida, the District of Minnesota, and the Northern District of California. My bar admission status in California and Minnesota is currently inactive. I am currently employed as an Assistant United States Attorney in the Southern District of Florida and was so employed during all of the events described herein.

2. I am the Assistant United States Attorney who was assigned to the investigation of

Jeffrey Epstein. For purposes of 18 U.S.C. § 3771(a)(5), I was the "attorney for the Government," although, as discussed below, no federal criminal charges were ever filed and there was no "case," as that term is used in the statute. I have previously filed two Declarations (*see* DE14 and DE35). This Declaration repeats some of the information contained in the earlier Declarations for ease of reference.

3. The federal investigation of Jeffrey Epstein was handled by the Federal Bureau of Investigation ("FBI"). The federal investigation was initiated in 2006 at the request of the Palm Beach Police Department ("PBPD") into allegations that Jeffrey Epstein and his personal assistants had used facilities of interstate commerce to induce young girls between the ages of thirteen and seventeen to engage in prostitution, amongst other offenses.

4. Although the U.S. Attorney's Office for the Southern District of Florida ("the Office") opened the matter to conduct an investigation and to evaluate a possible prosecution, the Office never accepted the matter for federal prosecution, that is, the Office never authorized the presentation of a proposed indictment to a federal grand jury or the filing of any federal charge in a criminal complaint or information, and no case was ever filed.

5. Throughout the investigation, the FBI's Victim-Witness Specialist and I prepared and provided victim notification letters. (*See* Exs. E[1] & F). Letters to reported victims were prepared early in the investigation and subsequently delivered as each of those victims was contacted. The victim notification letters that were sent early in the investigation were sent to

[1] Exhibits designated by a number are attached to this Declaration. Exhibits designated by a letter are attached to the Government's Response and Opposition to Petitioners' Motion for Partial Summary Judgment and Cross-Motion for Summary Judgment.

individuals who had been identified as potential victims of Epstein, but whom the investigative team had not yet interviewed and had not necessarily determined were in fact victims of a federal offense or came under the protection of the Crime Victims' Rights Act ("CVRA"). For example, the U.S. Attorney's Office letters were hand-delivered by FBI agents to Jane Doe 1 and Jane Doe 2 on dates subsequent to the dates of the letters. At the time those letters were sent, determinations had not yet been made that Jane Doe 1 and Jane Doe 2 were in fact victims of a federal offense or came under the protections of the CVRA. Nonetheless, the investigative team and I adopted an approach of providing more notice and assistance to potential victims than the CVRA may have required, even before the circumstances of those individuals had been fully investigated and before any charging decisions had been made. My letters to Jane Doe 1 and Jane Doe 2 notified them of their rights under the CVRA, including the right to confer with me and the right to seek counsel with respect to their CVRA rights. (*Id.*). My letters also contained my direct dial telephone number, the direct dial telephone number of the case agent, Nesbitt Kuyrkendall, and the telephone number for the Justice Department's Office for Victims of Crime. (*Id.*). Both Jane Doe 1 and Jane Doe 2 also received letters from the FBI's Victim-Witness Specialist, which were sent on January 10, 2008. (*See* Ex. J). Neither Jane Doe 1 nor Jane Doe 2 ever contacted me to discuss the investigation, potential charges or resolutions of the matter, or otherwise. If they had, I would have been happy to discuss the matter and provide their comments, concerns, or desires to my superiors. I never declined any victim's request to confer regarding any aspect of the investigation.

6. A subpoena was issued to Jane Doe 2 for testimony and documents in September, 2006. Within a few days, I was contacted by attorney James Eisenberg, who informed me that he

was representing Jane Doe 2. Mr. Eisenberg also informed me that Jane Doe 2 would not provide testimony or appear for a consensual interview unless the U.S. Attorney's Office obtained court-ordered use immunity for Jane Doe 2 pursuant to 18 U.S.C. § 6001, *et seq.* *See* Ex. A. I had several oral and written communications with Mr. Eisenberg asking him if Jane Doe 2 would appear under the protection of a standard *Kastigar* letter, but he told me that Jane Doe 2 would only appear if statutory immunity pursuant to 18 U.S.C. § 6001 was received. For example, in my letter of January 24, 2007, I confirmed my earlier conversation where Mr. Eisenberg had advised that Jane Doe 2 intended "to invoke the Fifth Amendment if questioned," and that she "was unwilling to speak to [the investigative team] pursuant to a *Kastigar* letter." (*See* Ex. 1.)

7. In the same letter of January 24, 2007, I raised concerns regarding whether Mr. Eisenberg had a conflict of interest. (*See id.*) As noted in Jane Doe 2's Declaration, Mr. Eisenberg's fees were paid by Jeffrey Epstein, the target of the investigation. In response, Mr. Eisenberg wrote the attached letter dated February 1, 2007. (*See* Ex. 2.) Mr. Eisenberg stated that it was the attitude of the U.S. Attorney's Office, in which the "office refuses to accept the fact that it is [Jane Doe 2's] decision not to cooperate with the government that upsets her." (*Id.* at ¶ 1.) Mr. Eisenberg also assured me "that there is no conflict of interest in [his] representation of [Jane Doe 2]. In this case I have always been asked and always will exercise independent judgment to follow my client's independent will." (*Id.* at ¶ 2.) Despite his expressed misgivings about the Palm Beach Police Department's handling of its investigation, Mr. Eisenberg stated that "[n]one of the above is directed at you personally. I want to repeat that you have always treated us with respect." (*Id.* at p. 2, final paragraph.)

8. In light of Mr. Eisenberg's representations that there was no conflict of interest, and in light of his clear statements that he represented Jane Doe 2, I could not directly contact or "confer" with Jane Doe 2 without running afoul of the Florida Bar rules (e.g., R. Regulating Fla. Bar 4-4.2) and 28 U.S.C § 530B.

9. I continued to converse with Mr. Eisenberg about having Jane Doe 2 appear for a voluntary interview, which continuously delayed the investigation. To that end, on February 5, 2007, I provided Mr. Eisenberg with two proposed *Kastigar* letters that I felt should assure Jane Doe 2 that she was being interviewed only as a witness and potential victim. (*See* Ex. 3.) At Jane Doe 2's request, I also prepared Office paperwork to obtain authorization for childcare while Jane Doe 2 was interviewed. (*See* Ex. 4.)

10. On February 12, 2007, after another conversation in which Mr. Eisenberg re-iterated Jane Doe 2's intent to invoke her Fifth Amendment privilege and Jane Doe 2's refusal to testify without 6001 immunity, Mr. Eisenberg provided, at my request, a letter detailing Jane Doe 2's concerns regarding testifying without immunity. (*See* Ex. 5.) In that letter, Mr. Eisenberg "reiterate[d] that [Jane Doe 2] will refuse to voluntarily cooperate with the federal government." Jane Doe 2 thereafter denied being involved in or a victim of any criminal activity and made statements meant to exculpate Jeffrey Epstein, including "[Jane Doe 2] never touched Mr. Epstein in a sexual way and Mr. Epstein never touched [Jane Doe 2] at all. At one point, Mr. Epstein did ask [Jane Doe 2] her age. [Jane Doe 2] insisted that she was eighteen years old." (*See id.*) Describing Jane Doe 2's position, Mr. Eisenberg wrote: "We believe no crime was committed." (*See id.*)

11. Based upon the proffer letter provided by Mr. Eisenberg, in March 2007, I prepared a Request for Authorization to Apply for a Compulsion Order seeking Immunity pursuant to 18 U.S.C. §§ 6001-6003 for Jane Doe 2. On April 13, 2007, Bruce C. Swartz, Deputy Assistant Attorney General, approved the request, on behalf of Alice Fisher, Assistant Attorney General. (*See* Ex. B.) I then applied to the Court for an Order compelling Jane Doe 2's testimony. U.S. District Judge Middlebrooks granted the application on April 16, 2007. (Ex. 6.)

12. After learning of Judge Middlebrooks' Order, Mr. Eisenberg asked whether Jane Doe 2 could appear for an interview, rather than provide formal testimony pursuant to her subpoena, so that he could be present. On April 24, 2007, Jane Doe 2 was interviewed; the interview was videotaped. (Ex. C.) During the interview, Jane Doe 2 again denied being involved in or a victim of any criminal activity and made statements meant to exculpate Jeffrey Epstein. (*See id.*) Jane Doe 2 also informed me and the FBI agents who were present that she "hope[d] . . . nothing happens to [Epstein] because he's an awesome man" and that she believed that it was "a shame that he has to go through this because he's an awesome guy and he didn't do nothing wrong, nothing." (*Id.*)

13. Other than that interview, I had no direct contact with Jane Doe 2 during the course of the investigation. Jane Doe 2 never contacted me at all, either directly or through Mr. Eisenberg, whether seeking information; requesting to confer with me regarding the investigation, charging decisions, or the resolution of the matter; or complaining that she was not being treated with fairness and respect.

14. In light of other evidence and witness statements, the investigative team considered Jane Doe 2's exculpatory statements to be false. Nonetheless, those statements precluded us from

including her as a victim who would be referenced in any federal indictment. Despite this, in light of the investigative team's general approach to try to go above and beyond in terms of caring for the victims, I continued to treat her as a victim. In that vein, shortly after the Non-Prosecution Agreement (NPA) was signed, I contacted Mr. Eisenberg to ask whether he still represented Jane Doe 2. Mr. Eisenberg stated that he did. I then told him that we would soon be making victim notifications, and asked Mr. Eisenberg whether I could send the notification directly to Jane Doe 2, or if it had to be served through him. Mr. Eisenberg instructed me that any victim notification should be sent to him.

15. As explained in further detail below, after the NPA was signed, Mr. Epstein, through his counsel, made several attempts to avoid having to perform the obligations that he had undertaken in the NPA. Several of those attacks alleged prosecutorial misconduct by me, and Epstein's attorneys used my efforts to provide a post-NPA-signing victim notification to Jane Doe 2 as evidence of that claimed misconduct. (*See, e.g.*, Ex. L.) In response to Mr. Lefkowitz's ruinous allegations against Jane Doe 2 and myself, on December 13, 2007, I sent a response to Mr. Lefkowitz defending myself and Jane Doe 2. (Ex. 7.)

16. During the course of the suit filed by Jane Doe 1 and Jane Doe 2, the Petitioners have alleged that the case agents, the U.S. Attorney's Office, and I personally committed acts that violated their rights under the CVRA. They have pointed to various pieces of correspondence with counsel for Epstein to suggest that the negotiations were not at arms' length or that certain things were done inappropriately in order to keep the victims from finding out about the NPA. Their interpretations and assertions are incorrect.

17. In the summer of 2007, Jeffrey Epstein, through his attorneys, and the U.S. Attorney's Office for the Southern District of Florida ("the Office") entered into negotiations to resolve the investigation. Prior to that, Epstein's attorneys had made several attempts to convince the Office to discontinue its investigation and not pursue any possible federal prosecution of Epstein. These attempts were rejected. At that time, Mr. Epstein had already been charged by the State of Florida with solicitation of prostitution, in violation of Florida Statutes § 796.07. Mr. Epstein's attorneys sought a global resolution of the matter. The Office instructed me to engage in negotiations to reach an agreement with Epstein to defer federal prosecution in favor of prosecution by the State of Florida, so long as certain basic preconditions were met – Epstein would have to serve a jail sentence of two years (later reduced to 18 months), Epstein would have to register as a sex offender, and Epstein would have to accept liability to the victims identified in the federal investigation for damages in lieu of the restitution that would have been mandatory if Epstein had been convicted of the federal offenses under investigation.

18. Prior to the Office making its decision to direct me to engage in negotiations with Epstein's counsel, I discussed the strengths and weaknesses of the case with members of the Office's management and informed them that most of the victims had expressed significant concerns about having their identities disclosed. While I was not part of the final decision-making at the Office that arrived at the two-year sentence requirement, I was part of the discussions regarding sex offender registration and the restitution provision. It is my understanding from these and other discussions that these factors, that is, the various strengths and weaknesses of the case and the various competing interests of the many different victims (including the privacy concerns expressed by many), together with the Office's desire to obtain a guaranteed sentence of

incarceration for Epstein, the equivalent of uncontested restitution for the victims, and guaranteed sexual offender registration by Epstein to help protect other minors throughout the country in the future, were among the factors that informed the Office's discretionary decision to negotiate a resolution of the matter and to ultimately enter into the NPA.

19. After the fact, Petitioners are critical of the NPA's terms. They have alleged that Epstein would easily have been convicted and that all of the victims were eager to participate in a full-fledged federal prosecution. Alternatively, they have suggested that a successful federal prosecution could have been mounted based solely on Epstein's actions with Jane Doe 1 and Jane Doe 2. As the prosecutor who handled the investigation, I can say that these contentions overlook the facts that existed at the time the NPA was negotiated. First, as set out above, Jane Doe 2 clearly stated her opposition to assisting the investigation, much less a prosecution. She was not alone. As noted in Special Agent Kuyrkendall's Declaration, many victims expressed reservations about assisting in the investigation. For example, Special Agent Timothy Slater described how one victim told him that she did not want to be bothered again, she had moved away to distance herself from the situation, and she wanted to "let this be in my past." (Ex. 8 at ¶ 7.) Similarly, the person whom Petitioners refer to as "Jane Doe 5" also had been approached by the investigative team in 2007 but refused to speak with them. (*See* D.E. 14 at ¶ 3.) Regardless of the perceived strength of the corroborating evidence, it was and remains my professional opinion as an experienced prosecutor that a successful prosecution would have required convincing all of the identified victims to come forward and speak publicly at a trial, knowing that they would face public scrutiny and withering cross-examination. Using my best efforts to accord all of the victims their right to be treated with fairness and with respect for their dignity and privacy, and in

the exercise of my prosecutorial discretion, I believed and still believe that a negotiated resolution of the matter was in the best interests of the Office and the victims as a whole. The Office had also reached that same conclusion.

20. Second, the suggestion that a successful prosecution could have been mounted naming only Jane Doe 1 and Jane Doe 2 as victims is overly optimistic at best. The investigative team and I worked tirelessly to put together the evidence necessary to prove beyond a reasonable doubt that Epstein committed federal offenses. We recognized how difficult a trial would be and that a successful case could be made only if a jury heard from a long series of credible victims, who did not know each other (to avoid an allegation of collusion) and who had all been subjected to the same treatment at Epstein's hands. A case involving just two victims who knew each other, including one who had previously stated – on videotape – that she never engaged in sexual contact with Epstein, would never have been charged as a federal case, must less resulted in a conviction.

21. Negotiations to resolve the Epstein matter were difficult, and it was not clear that they would be successfully completed. If Epstein did not enter an agreement with the Office, then the Office needed to be in the best position it could be to charge and convict him. Accordingly, I did not want to share with victims that the Office was attempting to secure for them the ability to obtain monetary compensation for the harm they had suffered. I was aware that, if I disclosed that and the negotiations fell through, Epstein's counsel would impeach the victims and my credibility by asserting that I had told victims they could receive money for implicating Epstein. In fact, Epstein's attorneys made exactly that claim in a deposition of one of the victims. (*See* Ex. 9 at 44-51.) Attorney Michael Tien, who represented Epstein, asked one of the identified victims the following questions:

TIEN: Now tell me about when the federal prosecutors told you about getting reimbursed.

A: I have no idea what you're talking about.

TIEN: Tell me about when the federal prosecutors spoke to you about getting money you feel you're entitled to from Mr. Epstein.

A: I don't know what you're talking about.

TIEN: Do you know who Marie Villafana is?

A: No, sir.

TIEN: Did you ever meet with any federal prosecutors?

A: I think – yeah. I think they were – I think they were like FBI.

TIEN: Uh-huh. Did you meet with federal prosecutors?

A: They came to my house one time, yes.

TIEN: When did they come to your house?

A: Very long ago.

TIEN: Was it this year, 2008?

A: It was not this year, no.

TIEN: Was it 2007?

A: I'd have to say at least two years ago or a year ago, yeah. So it would be 2007, 2006; but it was a while ago.

* * *

TIEN: So if I say the name to you Marie Villafana, you don't know who that is?

A: No, sir.

TIEN: How many women and how many men came to your house?

A: I want to say two ladies and two guys.

TIEN: Did someone named Jeffrey Sloman come to your house?

A: I don't know names, sir.

TIEN: Do you know who Jeffrey Sloman is?

A: No, sir.

* * *

TIEN: And you say you don't know who Jeff Sloman is?

A: No, sir.

TIEN: Does it refresh your recollection that he's the number two prosecutor at the U.S. Attorney's Office?

A: No.

TIEN: That he's Marie Villafana's boss?

A: No.

* * *

TIEN: Did you meet with an agent named Nesbitt Kuyrkendall, a woman?

A: I don't know.

TIEN: Did Ms. Kuyrkendall speak to you about getting reimbursed from Mr. Epstein?

A: I've never had a discussion with anyone about getting reimbursed from Mr. Epstein.

* * *

TIEN: And we've learned that many of the girls, some of whom are as old as 23, were told by the government that they would get money at the end of the criminal prosecution. Does that sound familiar to you?

A: No, sir.

While I knew that none of the Special Agents or I had ever discussed lawsuits or even restitution with any victim during any of their interviews and that First Assistant U.S. Attorney Sloman had never met any of the victims, this was exactly the type of cross-examination that I anticipated Epstein's attorneys would try at a trial. The Office and I concluded that opening up the possibility for such impeachment would be detrimental to the prosecution of Epstein if a negotiated resolution failed and Epstein were thereafter to be criminally charged.

22. As noted above, the negotiations were difficult and at times I urged the Office to break off negotiations when I felt Epstein's attorneys were proceeding in bad faith. Despite my reservations, I attempted to conduct the negotiations professionally and cordially. Petitioners in this case have attempted to construe some of my communications to suggest that I was overly friendly with Epstein's counsel to the detriment of the victims or that I was taking steps to undercut

the victims' ability to be present at any change of plea. These allegations are erroneous. I was simply being professional and cordial with opposing counsel.

23. For example, I am chided for an email regarding researching misdemeanor charges (*see* DE361 at ¶ 20), but, as noted above, I was instructed to construct a plea to federal or state offenses that resulted in a sentence of two years (later reduced to 18 months). This required me to find a relevant charge with the agreed-upon statutory maximum and then determine whether the facts developed in the investigation fit that charge. I was unable to find a relevant federal charge that had a statutory maximum of two years, and that required me to research the possibility of stacking two federal misdemeanor charges.

24. The Petitioners also suggest that I attempted to "contrive to establish jurisdiction away from the location where the crimes actually occurred—and away from where the victims actually lived—so as to avoid the public finding out about anything" (DE361 at ¶ 24). This also is false. By the time of that email, there already was intense press coverage of the case, including efforts to publicly identify victims. As noted above and in the Declaration of Special Agent Kuyrkendall, and even in the letters from Jane Doe 2's counsel (Exs. 2 and 5), the victims who had been interviewed in the federal investigation were most concerned about keeping their identities secret. The possibility of press coverage was a strong deterrent to their participation in the investigation and possible prosecution. My reason for recommending filing charges in Miami was to protect the privacy interests of the victims in the case by allowing them the opportunity to attend court proceedings – by definition, proceedings open to the public – with a reduced chance that their identities would be compromised. The FBI and the U.S. Attorney's Office regularly transport victims from their homes to court proceedings, and the same would have occurred if

federal charges against Epstein had been filed in Miami. Similarly, with regard to the selection of the attorney representative for the victims, I recommended two Miami attorneys whom I knew to have reputations for being tenacious, skillful, and committed to protecting their clients rather than burnishing their reputations in the press. Although I understood that any civil suits that were filed would be publicly available, in light of the stated desire of most victims to remain anonymous, I did not believe that an attorney representative who actively sought out press coverage would be best suited to represent the victims in this case and protect their privacy interests.

25. Petitioners' suggestion that it was the Office, rather than the victims, who desired confidentiality also is misplaced. Even now, more than a dozen years after the investigation began, the Petitioners are proceeding by pseudonym to protect their privacy, and the Office has asserted the privacy rights of the other identified victims, as has counsel for other victims (*e.g.*, DE 335). All of the victims who filed civil claims against Epstein did so by pseudonym, and some victims did not even pursue civil claims for fear of being publicly identified. A suggestion that, ten to twelve years ago, when many were still teenagers, the victims were willing to step forward in a public forum and expose themselves to public scrutiny – much of which was unfairly critical of them – is unfounded and untrue.

26. In June 2009, while Jane Doe 1 and Jane Doe 2 and many other victims were pursuing their civil suits against Epstein and while the instant case was pending, the Court asked me to address an issue related to the NPA and the civil suits. With counsel for Petitioners present, I informed the Court that:

> the non-prosecution agreement[] sought to do one thing, which was to place the victims in the same position they would have been if Mr. Epstein had been convicted of the federal offenses for which he was investigated. And that if he had

> been federally prosecuted and convicted, the victims would have been entitled to restitution, regardless of how long ago the crimes were committed, regardless of how old they were at the time, and hold old they are today, or at the time of the conviction. And it also would have made them eligible for damages under [18 U.S.C. §] 2255. And so our idea was, our hope was that we could set up a system that would allow these victims to get that restitution without having to go through what civil litigation will expose them to. *You have a number of girls who were very hesitant about even speaking to authorities about this because of the trauma that they have suffered and about the embarrassment that they were afraid would be brought upon themselves and upon their families. So we do through the non-prosecution agreement tried [sic] to protect their rights while also protecting their privacy.*

(Ex. 10 at 31-32 (emphasis added)). None of the victims' attorneys who were present, including Petitioners' counsel, disputed my statement, and that statement remains true today. The investigative team, the FBI's victim-witness coordinator, and I all proceeded with a "victims first" approach, and we all used our best efforts to protect the victims and accord them their rights. Petitioners allege that I did not give their now-professed desires to have Epstein prosecuted sufficient weight, but they never communicated those desires to me or the FBI agents and my role was to evaluate the entire situation, consider the input received from all of the victims, and allow the Office to exercise its prosecutorial discretion accordingly.

27. Petitioners' motion also suggests that some of the terms of the NPA or my actions were improper (*see* DE361 at ¶¶ 26-27). First, plea negotiations – like settlement negotiations (whether between the parties in the instant case or between Jane Doe 1, Jane Doe 2, and Epstein) – are normally kept confidential. Rule 11(c)(1) of the Federal Rules of Criminal Procedure prohibits judicial involvement in plea negotiations, and the Eleventh Circuit has ruled that there is a "bright line rule" that courts should not offer any comments on plea negotiations. *See, e.g., United States v. Johnson*, 89 F.3d 778, 783 (11th Cir. 1996); *United States v. Tobin*, 676 F.3d

1264, 1307 (11th Cir. 2012). Likewise, Federal Rule of Criminal Procedure 6(e) requires confidentiality for persons subject to a grand jury investigation. My recommendations to opposing counsel to limit any plea agreement to its essential terms, rather than disclosing the reasons behind those terms, and to exclude the names of persons who would not be parties to the agreement, was in keeping with those general policies. Finally, when at an impasse in negotiations, a change of venue can be beneficial, such as when settlement conferences are held in a judge's chambers or a mediator's office rather than in the office of one of the parties. My suggestion to meet Epstein's counsel "off campus" was in no way improper; it was simply an effort to facilitate a resolution through a meeting at a neutral location, but that meeting never even occurred. On the other hand, during the course of the investigation, I routinely traveled to meet with victims at their homes, their jobs, and at coffee shops.

28. With regard to paragraph 29 of DE361, copies of emails sent to and from my personal email address were produced in discovery. Pursuant to my agreement with Mr. Edwards (counsel for Petitioners), personal email addresses were redacted. Some of those emails are included in the exhibits attached to Petitioners' motion. (*See, e.g.*, DE361-15.)

29. In the end, the Office and I agreed that no federal misdemeanor charges adequately addressed the facts of the case, and the Office decided that, instead, it would forego federal prosecution if Epstein pled guilty to an applicable state offense that would require sex offender registration and an 18-month jail term, and if Epstein also agreed to allow the identified victims to obtain an uncontested recovery of damages in lieu of the restitution that would have been available under federal law.

30. Also, with regard to the confidentiality of the Non-Prosecution Agreement, the statements contained in paragraph 31 of DE361 are accurate. As courts have acknowledged, NPAs are not made part of a public court file but are maintained by a prosecutor's office. The Privacy Act, Fed. R. Crim. P. 6(e), and other statutes and rules keep private files related to subjects of investigations. There are some laws, including FOIA, that limit the confidentiality of those files, but, generally speaking, there is no public right of access to the Office's files. Thus, the assurance that I would not distribute – essentially, "leak" – the NPA was simply an assurance that I intended to abide by Office and Department policy and the law. The NPA made clear that the Office would disclose the NPA in response to appropriate FOIA requests and compulsory process, but would provide Epstein with notice before making such disclosure. (DE361, Ex. 62 at 5.) In part, this notice would ensure that no unlawful disclosure would be made mistakenly and subject the Office to civil liability. Nothing in the NPA prohibited disclosing its terms to the victims; the confidentiality provision covered only the document itself.

31. Petitioners' motion contains a number of other criticisms of the terms of the NPA, but despite my letters to them giving them my telephone number and encouraging them to contact me, neither Jane Doe 1 nor Jane Doe 2 ever contacted me or Special Agent Kuyrkendall prior to the signing of the NPA to ask about the investigation or to encourage prosecution. Jane Doe 2 specifically told me that she did not want Epstein prosecuted. Other victims had told me their fears of having their involvement with Esptein revealed and the negative impact it would have on their relationships with family members, boyfriends, and others.

32. Once the NPA was signed on September 24, 2007, I asked the agents to meet with the victims to provide them with information regarding the terms of the agreement and the

conclusion of the federal investigation. I also anticipated that they would be able to inform the victims of the date of the state court change of plea, but that date had not yet been set by state authorities at the time the first victims were notified.

33. Special Agents Kuyrkendall and Richards met with three victims, including Jane Doe 1, soon after the NPA was signed. It had been anticipated that they would meet with all the victims. However, almost immediately after the NPA was signed, Epstein, through his counsel, began to delay and inhibit the performance of his obligations under the NPA. First, he challenged the method for selecting the attorney-representative provided by the NPA for victims who wished to use that attorney's services in seeking damages from Epstein. Among other efforts, Epstein also sought to challenge the list of victims identified during the course of the investigation and, as mentioned above, specifically attacked the inclusion of Jane Doe 2 as a victim because of her exculpatory statements. While Petitioners here suggest that I was too lenient in my handling of the negotiations with Epstein's counsel, after the NPA was signed, Epstein's counsel raised challenges that I had been too aggressive.

34. These and other attacks and efforts to avoid the NPA's terms led the FBI investigative team, the Office, and me to conclude that prosecution and trial remained a possibility and we should prepare as such. This meant that the victim notifications had to cease because: (1) we no longer knew whether Epstein would perform under the NPA and, hence, we did not know whether providing information about the NPA would be accurate; and (2) we believed that Epstein, through his counsel, would attempt to use victim notifications concerning the NPA to suggest that the victims had been encouraged by the FBI or the Office to overstate their victimization for monetary compensation. The FBI and the Office decided, therefore, to do no further notifications

regarding the NPA at that time. Our concerns were prescient as shown by the deposition quoted in paragraph 21 above. This deposition occurred in February 2008 during the period that Epstein was complaining to various levels of the Justice Department about the investigation and the NPA.

35. Accordingly, the investigation continued while Epstein raised numerous erroneous allegations against me, the investigative team, other Office personnel, and the victims, seeking release from the Office and the Department of Justice of the obligations he had undertaken in the NPA. (*See* Exs. D, G, K, L, O.) While those "appeals" proceeded to the U.S. Attorney, the Child Exploitation and Obscenity Section in Washington, D.C., the Assistant Attorney General, and the Deputy Attorney General, the investigative team and I continued interviewing and identifying victims, issuing subpoenas, and collecting evidence. The investigation continued up until the day that Epstein entered his state court guilty plea.

36. One of the people who was re-interviewed after the NPA was signed was Jane Doe 1, who was re-interviewed on January 31, 2008. I was present for that interview. Since I was aware that Epstein might proceed to trial, as with other victims whom I interviewed, I asked Jane Doe 1 whether she would be willing to testify if there were a trial. At that time, Jane Doe 1 stated that she hoped Epstein would be prosecuted and that she was willing to testify. The FBI's letters of January 10, 2008, informing Jane Doe 1 and Jane Doe 2 that the case was still under investigation and that it could be a lengthy process (Ex. J) were accurate. Jane Doe 1's re-interview was part of that continued investigation, so no one was deceived. The process was not lengthier only because Epstein ultimately entered his state court guilty pleas as contemplated by the NPA.

37. In mid-June 2008, Attorney Edwards contacted your Affiant to inform me that he represented Jane Doe 1 and another identified victim (not Jane Doe 2). Attorney Edwards asked to meet to provide me with information regarding Epstein. On June 19, 2008, Attorney Edwards sent me an email stating that he had "information and concerns that I would like to share" and that he wanted to meet with me to "discuss [his] plans." DE362-30. As noted in the email, he had one "client" at the time, who has been referred to in this suit as Jane Doe 1, and he did not state that Jane Doe 1 wished to meet with me. (*Id.*) I invited Attorney Edwards to send to me any information that he wanted me to consider. At the time of my conversation with Attorney Edwards, I was still preparing to present charges against Epstein if Epstein succeeded in having the NPA set aside or if he failed to perform the terms of the NPA. I did not disclose the existence of the NPA to Edwards because I did not know whether the NPA remained viable at that time or whether Epstein would enter the state court guilty pleas that would trigger the NPA. I was aware that a final decision on Epstein's challenges to the NPA and the federal investigation was expected shortly, so I impressed upon Attorney Edwards that time was of the essence. Attorney Edwards sent nothing at that time, nor did he ever inform me that Jane Doe 1 and/or Jane Doe 2 wanted to confer with me before any resolution was reached. If anything had been provided by Edwards, Jane Doe 1, or Jane Doe 2, I would have reviewed it and shared it with my superiors. I also advised Attorney Edwards that he should consider contacting the State Attorney's Office. I was informed, however, that no contact with that office was made. At that time, attorney Edwards had also alluded to Jane Doe 2, so I advised him that, to my knowledge, Jane Doe 2 was still represented by Attorney James Eisenberg. He did not dispute or correct my understanding.

39. On July 3, 2008, attorney Edwards contacted me to discuss how the Epstein matter had been resolved and to raise concerns regarding that resolution. I shared the concerns that attorney Edwards raised with my superiors at the U.S. Attorney's Office.

40. I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 2nd day of June, 2017.

A. Marie Villafaña, Esq.

38. On Friday, June 27, 2008, at approximate 4:15 p.m., I received a copy of Epstein's proposed state plea agreement and learned that Epstein's state court change of plea was scheduled for 8:30 a.m., Monday, June 30, 2008. The Palm Beach Police Department and I attempted to notify the victims about that hearing in the short time available to us. I specifically called attorney Edwards to provide notice to his clients regarding the hearing. I believe that it was during this conversation that Attorney Edwards notified me that he represented Jane Doe 2. I urged attorney Edwards to have his clients attend the hearing so that they could address the Court, if they wished, and I stressed the importance of the hearing. I never told Attorney Edwards that the state charges involved "other victims," and neither the state court charging instrument nor the factual proffer limited the procurement of prostitution charge to a specific victim. In fact, as mentioned in ¶ 37, *supra*, I had encouraged Attorney Edwards to contact the State Attorney's Office to discuss his client and the Epstein investigation with the state prosecutor. Attorney Edwards informed me that he could not attend the hearing but that someone would be present at the hearing. The case agents and I attended the hearing as members of the general public, and did not publicly announce our presence since we were there only as observers. Neither attorney Edwards nor any of his clients were present, and no one identified themselves to me, the FBI agents, or the state court as being present on behalf of the petitioners.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE #1 AND JANE DOE #2,

Petitioners,

vs.

UNITED STATES,

Respondent.
_____/

SECOND DECLARATION OF E. NESBITT KUYRKENDALL

I, E. Nesbitt Kuyrkendall, declare as follows:

1. I am a Special Agent in the Federal Bureau of Investigation (FBI) and have been so employed since 1997. I am currently assigned to the West Palm Beach office of the FBI Miami Field Division.

2. In 2006, I was assigned as the case agent on the investigation of Jeffrey Epstein, which was referred to as Operation Leap Year.

3. As part of that investigation, I attempted to interview Jane Doe #2 at her residence. Jane Doe #2 was walking to her vehicle, and she refused to speak with me.

4. I returned to my vehicle to get a grand jury subpoena for Jane Doe #2 and handed it to her. Jane Doe #2 threw the grand jury subpoena onto the ground. I then verbally instructed her that it was a court order and she was expected to appear at the grand jury at the location, date, and time that appeared on the subpoena. Jane Doe #2 got into the vehicle and drove away without speaking to me.

5. Jane Doe #2 later obtained counsel and appeared for a videotaped interview on April 24, 2007. During the videotaped interview, Jane Doe #2 expressed her opinion that Jeffrey Epstein should not be prosecuted. She said, "I hope Jeffrey, nothing happens to Jeffrey because he's an awesome man and it would really be a shame. It's a shame that he has to go through this because he's an awesome guy and he didn't do nothing wrong, nothing."

6. Other than these events, neither I nor any other FBI agent had any contact with Jane Doe #2 during the course of the investigation. Jane Doe #2 never contacted me or my co-case agents asking for information about the investigation or asking to confer with anyone from the government about the resolution of the matter.

7. On August 7, 2007, my co-case agent and I interviewed Jane Doe #1 as part of the investigation of Jeffrey Epstein. At no time during that interview did Jane Doe #1 ask to confer with anyone from the government about any potential criminal charging decisions or about any potential resolution of the matter. An FBI report was prepared. Between the time of the interview and the signing of the Non-Prosecution Agreement in September 2007, Jane Doe #1 never contacted me or my co-case agent asking for information about the investigation or asking to confer with anyone from the government about any potential criminal charging decisions or about the resolution of the matter.

8. In October 2007, my co-case agent and I met with Jane Doe #1 at a Publix grocery store in Palm Beach Gardens. We were meeting with Jane Doe #1 to advise her of the main terms of the Non-Prosecution Agreement. Among other information I provided, I told Jane Doe #1 that an agreement had been reached, Mr. Epstein was going to plead guilty to two state charges, and there would not be a federal prosecution.

9. After my co-case agent and I met with Jane Doe #1 and two other victims, I became concerned about what would happen if Jeffrey Epstein failed to perform his obligations under the Non-Prosecution Agreement. If Mr. Epstein breached or failed to perform those obligations, then the government would need to be ready to proceed with a prosecution. I was concerned that if the victims were informed of the Non-Prosecution Agreement, which included an option for victims to seek monetary damages in a civil matter, then Epstein's counsel would use the notifications to impeach me and the victims if a prosecution were to proceed in the future. Accordingly, after conferring with the U.S. Attorney's Office, a decision was made that no further notifications would be made at that time.

10. After the Non-Prosecution Agreement was signed, in the last quarter of 2007 and continuing through 2008, the investigative team felt that there was a possibility that Epstein would breach or fail to perform the terms of the Agreement. Accordingly, the investigation continued in case the prosecution of Epstein would later proceed. The continuing investigation included additional witness interviews, service of grand jury subpoenas, and testimony before the grand jury.

11. On January 31, 2008, as part of the continuing investigation of Jeffrey Epstein, I participated in an interview of Jane Doe #1 with Marie Villafaña from the U.S. Attorney's Office and Myesha Braden from the Justice Department. Jane Doe #1 was re-interviewed in case Epstein breached or failed to perform under the Non-Prosecution Agreement.

12. Throughout the investigation, we interviewed many victims that fell within the scope of Mr. Epstein's criminal activity. A majority of the victims expressed concern about the possible disclosure of their identities to the public. A number of the victims raised concerns about having to testify and/or their parents finding out about their involvement with Mr. Epstein.

Additionally, for some victims, learning of the Epstein investigation and possible exposure of their identities caused them emotional distress. Overall, many of the victims were troubled about the existence of the investigation. They displayed feelings of embarrassment and humiliation and were reluctant to talk to investigators. Some victims who were identified through the investigation refused even to speak to us. Our concerns about the victims' well-being and getting to the truth were always at the forefront of our handling of the investigation.

13. During interviews conducted from 2006 to 2008, no victims expressed a strong opinion that Epstein be prosecuted. As noted above, Jane Doe #2 expressed her opinion that nothing should happen to Epstein.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on May 22, 2017.

E. Nesbitt Kuyrkendall

E. NESBITT KUYRKENDALL
Special Agent
Federal Bureau of Investigation
West Palm Beach, Florida

U.S. Department of Justice

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Re: Jeffrey Epstein

Dear Mr. Starr:

I write in response to your November 28th letter, in which you raise concerns regarding the Non-Prosecution Agreement between this Office and your client, Mr. Epstein. I take these concerns seriously. As your letter focused on the Section 2255 portion of the Agreement, my response will focus primarily on that issue as well. I do wish to make some more general observations, however.

Section 2255 provides that "[a]ny person who, while a minor, was a victim of a violation of [enumerated sections of Title 18] and who suffers personal injury as a result of such violation . . . may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee." Thus, had this Office proceeded to trial, and had Mr. Epstein been convicted, the victims of his actions would have been able to seek to relief under this Section.

The Non-Prosecution Agreement entered into between this Office and Mr. Epstein responds to Mr. Epstein's desire to reach a global resolution of his state and federal criminal liability. Under this Agreement, this District has agreed to defer prosecution for enumerated sections of Title 18 in favor of prosecution by the State of Florida, provided that the Mr. Epstein satisfies three general federal interests: (1) that Mr. Epstein plead guilty to a "registerable" offense; (2) that this plea include a binding recommendation for a sufficient term of imprisonment; and (3) that the Agreement not harm the interests of his victims. This third point deserves elaboration. The intent is to place the victims in the same position as they would have been had Mr. Epstein been convicted at trial. No more; no less.

With this in mind, I turn to the language of the Agreement. Paragraph 8 of the Agreement provides:

> If any of the individuals referred to in paragraph (7), *supra*, elects to file suit pursuant to 18 U.S.C. § 2255, Epstein will not contest the jurisdiction of the United States

> District Court for the Southern District of Florida over his person and/or the subject matter,[1] and Epstein waives his right to contest liability and also waives his right to contest damages up to an amount as agreed to between the identified victim and Epstein, so long as the identified victim elects to proceed exclusively under 18 U.S.C. § 2255, and agrees to waive any other claim for damages, whether pursuant to state, federal, or common law. Notwithstanding this waiver, as to those individuals whose names appear on the list provided by the United States, Epstein's signature on this agreement is not to be construed as an admission of any criminal or civil liability other than that contained in 18 U.S.C. § 2255.

Although these two sentences are far from simple, they appear to incorporate our intent to narrowly tailor the Agreement to place the identified victims in the same position as they would have been had Mr. Epstein been convicted at trial. I would note that I have conferred with our prosecutors and have been told that Paragraph 8 was vigorously negotiated and that the final language was suggested largely by defense counsel.

The concerns raised in your letter with respect to Paragraph 8 fall within several general categories. First, you raise concerns regarding the nature of Section 2255. As you note,

> Section 2255 is a civil statute implanted in the criminal code; in contrast to other criminal statutes, Section 2255 fails to correlate payments to specific injuries or losses. Instead the statute presumes that victims have sustained damages of at least a minimum lump sum without regard to whether the complainants suffered actual medical, physiological or other forms of individualized harm.

These concerns were, I would expect, aired when Congress adopted this statute. Even if they were not, this provision is now law. Rule of law requires now requires this District to consider the victims' rights under this statute in negotiating this Agreement.

Second, you raise concerns regarding the identity-of-the-victims issue. Your concerns appear based on the belief that Paragraph 8 is a blanket waiver of liability with respect to any number of unnamed and undisclosed victims. I would invite you to confer with your co-counsel regarding this matter. Although the language of Paragraph 8 could be so construed, our First Assistant informed Mr. Lefkowitz some weeks ago that this was not our position. As Mr. Lefkowitz has noted, were Mr. Epstein convicted at trial, the plaintiff-victims in a subsequent Section 2255 suit would still have had some burden to prove that they were "victims." It is also the case, however, that were Mr. Epstein convicted at trial, the plaintiff-victims would not have to show that a violation of an enumerated section of Title 18 took place. Accordingly, our First Assistant informed Mr. Lefkowitz some weeks ago that we understood that if a victim-plaintiff elects to proceed to trial, Mr. Epstein's

[1] Although not identified as an issue by defense counsel, having reviewed this language, I note that Paragraph 8 raises the question of what is meant by "subject matter." I have conferred with the AUSA who negotiated this language, and have been informed that parties intended this to address issues of venue. This Office will not interpret this paragraph as any waiver of subject matter jurisdiction. Please inform me if defense counsel disagrees.

legal team might conduct due diligence to confirm the that victim-plaintiff in fact had inappropriate contact with Mr. Epstein. Once again, our interpretive principle is our intent to place the victim in the same position she would have been had Mr. Epstein proceeded to trial.

Third, you raise concerns regarding our decision not to create a restitution fund. Throughout the negotiations, defense counsel suggested several similar arrangements, including a Trust fund. Again, our decision not to create a fund flows from our belief that the Agreement should provide the same relief to the victims as they would have been entitled had we proceeded to trial. A restitution fund or trust fund would place an upper limit on the victims' recovery. It is not for this Office to make that decision for the victims. They may choose to walk away, they may choose to settle, or they may choose to sue. The choice should remain with each individual victim.[2]

Fourth, you raise concerns regarding the selection process for the attorney representative. As you may be aware, the suggestion that we appoint an attorney representative originated with defense counsel. Defense counsel, I believe, found it advantageous to attempt to negotiate a settlement of the many victims' claims with one attorney representative. My Office agreed to appoint such a representative, in part, because we too thought it valuable for the victims to have the advice of an attorney who could advise them of their choices: whether to walk away, to settle or to sue.

Since the signing of the Agreement, several issues have arisen with respect to this provision. First, I elected to assign this Office's right to appoint the representative to an independent third-party, former federal Judge Davis. I did this to avoid any suggestion that this Office's choice of representative was intended to influence the outcome of civil litigation. Second, your co-counsel expressed concerns similar to those raised in your letter regarding the criteria used to select the representative. These criteria were:

(1) Experience doing both plaintiffs' and defense litigation;
(2) Experience with state and federal statutory and common law tort claims;
(3) Ability to communicate effectively with young women;
(4) Experience litigating against large law firms and high profile attorneys who may test the veracity of the victims' claims;
(5) Sensitivity to the nature of the suit and the victims' interest in maintaining their privacy;
(6) Experience litigating in federal court in the Southern District of Florida;

[2] Your letter references *U.S. v Boehm*, No. 3:04CR00003 (D. Ala 2004) as a model for a restitution fund settlement. I asked our prosecutor to contact the AUSA in that case. In that matter, the District of Alaska sought out and obtained the consent of all the victims before entering into that settlement. In addition, they developed an elaborate procedure for deciding which victim would receive what. My view, in this case, is that those types of negotiations are better handled between Mr. Epstein and the victims' representatives, and that this Office should not act as intermediary. Finally, I would note that in *Boehm* as well, the victims' identities were not initially disclosed. As the AUSA wrote in that case: "This filing is made ex parte because Boehm, in his plea agreement, waived any rights he had pertaining to the selection of beneficiaries and the disbursement of funds to such beneficiaries."

(7) The resources to hire experts and others, while working on a contingency fee basis, in order to prepare for trial if a settlement cannot be reached (defense counsel has reserved the right to challenge such litigation); and
(8) The ability to negotiate effectively.

At my direction, our First Assistant provided our criteria to your co-counsel, Mr. Lefkowitz, in advance, and at co-counsel's request, he noted in our communication with Judge Davis, defense counsel's objection to criteria 7. I have now reviewed these criteria and find them balanced and reasonable. They appear designed to provide the victims with an attorney who can advise them on all their options, whether it be to walk away, to settle (as your client prefers), or to litigate. Again, our intent is not to favor any one of these options, but rather to leave the choice to each victim.

Fifth, you assert that this Office "has improperly insisted that the chosen attorney representative should be able to litigate the claims of the individuals," should a resolution not be possible. This issue, likewise, has already been raised and addressed in discussions between your co-counsel and our First Assistant. We understand your position that it would be a conflict of interest for the attorney representative to subsequently represent victim-plaintiffs in a civil suit. Your interpretation of the ethics rules may be correct, or it may be wrong. Far from insisting that the attorney representative can represent victim-plaintiffs in subsequent litigation, our First Assistant and I have repeatedly told defense counsel that we take no position on this matter. Indeed, I fully expect your defense team to litigate this issue with the attorney representative if a resolution is not reached.

I have responded personally and in some detail to your concerns because I deeply care about both the law and the integrity of this Office. I have responded personally and in some detail as well because your letter troubled me on a number of levels. My understanding of the negotiations in this matter informs my concerns.

The Section 2255 provision issue was first discussed at a July 31, 2007, meeting between FAUSA Sloman, Criminal Chief Menchel, West Palm Beach Chief Lourie, AUSA Villafaña, and two FBI agents who met with Roy Black, Gerald Lefcourt, and Lilly Ann Sanchez. On that date, the prosecutors presented a written, four-bullet-point term sheet that would satisfy the federal interest in the case and discussed the substance of those terms. One of these four points was the following provision:

> Epstein agrees that, if any of the victims identified in the federal investigation file suit pursuant to 18 U.S.C. § 2255, Epstein will not contest the jurisdiction of the U.S. District Court for the Southern District of Florida over his person and the subject matter. Epstein will not contest that the identified victims are persons who, while minors, were victims of violations of Title 18, United States Code, Sections(s) 2422 and/or 2423.

In mid August 2007, your defense team, dissatisfied with my staff's review of the case, asked to meet with me. Mr. Lefkowtiz indicated your busy schedule, and asked me to put off until September 7, 2007, so that you could attend. Mr. Lefkowitz also indicated that he might appeal my decision to Washington D.C., if my decision was contrary to his client's interest. I agreed to the September 7th meeting, despite the fact that our AUSA had an indictment ready for presentation to the grand jury. An explicit condition of that agreement, however, was an understanding between Mr. Lefkowitz and myself that any appeal to Washington would be undertaken expeditiously.

On September 7, 2007, I, along with FAUSA Sloman, AUSAs McMillan and Villafaña, and FBI agents, met with you, Mr. Lefkowitz, and Ms. Sanchez. I understood that you wished to present federalism-based concerns regarding our prosecution. To ensure a full consideration of your arguments, I invited Drew Oosterbaan, Chief of the Criminal Division's Child Exploitation and Obscenity Section, to travel from Washington to attend our meeting. During the September 7th meeting, your co-counsel, Mr. Lefkowitz, offered a plea resolution. The inclusion of a Section 2255 remedy was specifically raised and discussed at the September 7th meeting. Indeed, according to AUSA Villafaña's notes, you thanked her for bringing it to your attention. Again, no objection to the Section 2255 issue was raised.

After considering the arguments raised at the September 7th meeting, and after conferring with the FBI and with Chief Oosterbaan, our Office decided to proceed with the indictment. At that time, I reminded Mr. Lefkowitz that he had previously indicated his desire to appeal such a decision to the Attorney General, the Deputy Attorney General, or the Assistant Attorney General for the Criminal Division, and I offered to direct our prosecutors to delay the presentation of the indictment to allow you or he to appeal our decision if you so chose. He decided not to do so.

Instead, Mr. Epstein elected to negotiate the Non-Prosecution Agreement. These negotiations were detailed and time-consuming. Mr. Epstein's defense team, including yourself, Professor Dershowitz, former United States Attorney Guy Lewis, Ms. Lilly Ann Sanchez and Messrs. Roy Black, Jack Goldberger, Gerry Lefcourt and Jay Lefkowitz had the opportunity to review and raise objections to the terms of the Agreement. Again, no one raised objections to the Section 2255 language.

Since the signing of the Agreement, the defense team and our Office have addressed several issues that have arisen under the Agreement. Although the exchanges were at times a bit litigious, it appears that these issues have been resolved by mutual consent, some in favor of your client, some not so.

It is against these many previous foregone opportunities to object that I receive with surprise your letter requesting an 11th hour, after-the-fact review of our Agreement. Although it happens rarely, I do not mind this Office's decision being appealed to Washington, and have previously directed our prosecutors to delay filings in this case to provide defense counsel with the option of appealing our decisions. Indeed, although I am confident in our prosecutors' evidence and legal analysis, I nonetheless directed them to consult with the subject matter experts in the Criminal

Division's Child Exploitation and Obscenity Section to confirm our interpretation of the law before approving their indictment package. I am thus surprised to read a letter addressed to Department Headquarters that raises issues that either have not been raised with this Office previously or that have been raised, and in fact resolved, in your client's favor.

I am troubled, likewise, by the apparent lack of finality in this Agreement. The AUSAs who have been negotiating with defense counsel have for some time complained to me regarding the tactics used by the defense team. It appears to them that as soon as resolution is reached on one issue, defense counsel finds ways to challenge the resolution collaterally. My response thus far has been that defense counsel is doing its job to vigorously represent the client. That said, there must be closure on this matter. Some in our Office are deeply concerned that defense counsel will continue to mount collateral challenges to provisions of the Agreement, even after Mr. Epstein has entered his guilty plea and thus rendered the agreement difficult, if not impossible, to unwind.

Finally, I am most concerned about any belief on the part of defense counsel that the Agreement is unethical, unlawful or unconstitutional in any way.[3]

In closing, I would ask that you consult with co-counsel. If after consultations within the defense team, you believe that our Agreement is unethical, unlawful or unconstitutional, I would ask that you notify us immediately so that we can discuss the matter by phone or in person. I have consulted with the chief prosecutor in this case, who has advised me that she is ready to unwind the Agreement and proceed to trial if necessary or if appropriate.

I would reiterate that it is not the intention of this Office ever to force the hand of a defendant to enter into an agreement against his wishes. Your client has the right to proceed to trial. Although time is of the essence (I understand that certain filings are due to our Office no later than December 7th and that certain events must take place no later than December 14th), I am directing our prosecutors not to issue victim notification letters until this Friday at 5 p.m., to provide you with time to review these options with your client. We are available by phone or in person, in the interim, to

[3] It is not clear from your letter whether you believe that attorneys in this Office have acted improperly. Your letter, for example, alludes to the need to engage in an inquiry to assure that disclosures to potential witnesses did not undermine the reliability of the results of this federal investigation. As a former Department of Justice attorney, I am certain that you recognize that this is a serious allegation. I have raised this matter with AUSA Villafaña who informed me that the victims were not told of the availability of Section 2255 relief during the investigation phase of this matter. If you have specific concerns, I ask that you raise these with me immediately, so that I can make appropriate inquiries.

address any matters that might remain unaddressed in this letter. We expect a written decision by this Friday at 5 p.m., indicating whether the defense team wishes to reaffirm, or to unwind, the Agreement.

Sincerely,

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

cc: Alice Fisher, Assistant Attorney General
Jeffrey Sloman, First Assistant U.S. Attorney
AUSA A. Marie Villafaña